Supreme Court of the United States

No. 707 OCTOBER TERM, 1941.

LEWIS J. VALENTINE, individually and as Police Commissioner of The City of New York,

Petitioner,

against

F. J. CHRESTENSEN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

May the City of New York prohibit the street distribution of "commercial and business advertising matter" without impairing the right of freedom of the press in violation of the First and Fourteenth Amendments to the Constitution, or the due process clause of the Fourteenth Amendment? If it may, is a regulation to that effect unconstitutional when applied to a commercial handbill to which there has gratuitously been added a protest against certain action of the City authorities? Two questions of first impression which are of importance to municipalities throughout the country.

October 20, 1941.

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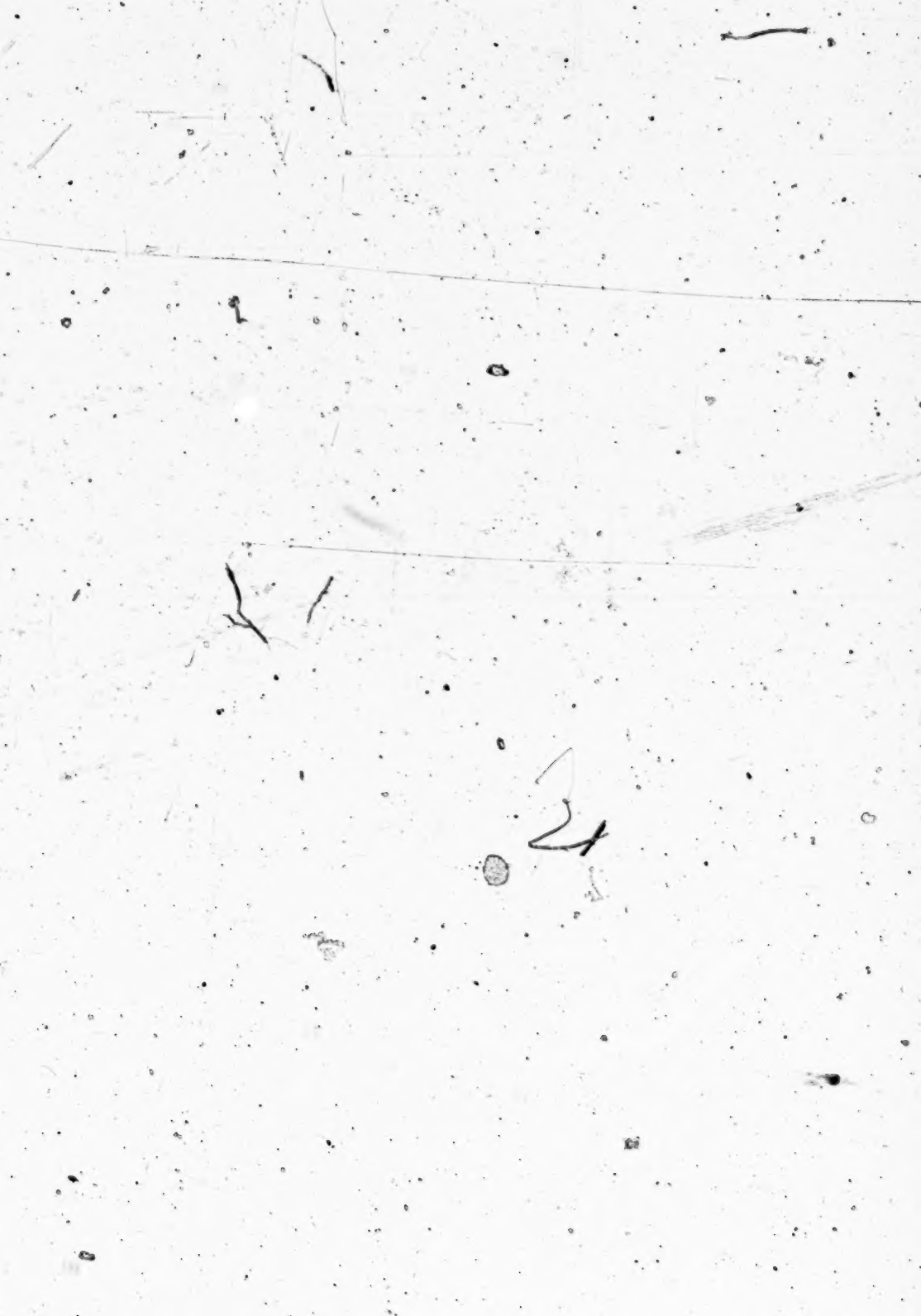

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of Lewis J. Valentine, individually and as Police Commissioner of the City of New York, respectfully shows:

1. As Police Commissioner of the City of New York your petitioner is charged by law with the enforcement of § 318 of the Sanitary Code of the City of New York, which provides as follows:

> "*Handbills, cards and circulars.*—No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letterbox therein; provided that nothing herein con-

tained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States postal service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or by annual subscription. *This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter.*" (Italics ours.)

2. F. J. Chrestensen is the owner and exhibitor for profit of the former United States Navy Submarine S-49. In the latter part of June, 1940, when the S-49 was on exhibition at Pier 5 on the East River, New York City, Chrestensen prepared and printed a handbill describing the submarine's attractions and soliciting public patronage (R. 26). This handbill is hereinafter referred to as handbill No. 1.

3. Chrestensen was advised by your petitioner that the distribution of handbill No. 1 on the public streets of the City would violate the above-quoted § 318 of the Sanitary Code, which prohibits such distribution of "commercial and business advertising matter." Chrestensen was further advised, however, that he was free to distribute handbills devoted solely to "information or public protest".

4. Chrestensen thereupon prepared, and exhibited to your petitioner in proof form, a double-faced handbill (R. 24-25). Its face was a revision of handbill No. 1, and it is stipulated that it contains nothing but commercial advertising matter. Its reverse side, it is stipulated, consists of a protest against the conduct of the Department of Docks of the City of New York in denying him certain wharfage facilities for the exhibition of his submarine, and is devoid of advertising matter. This second handbill is hereinafter called handbill A.

5. Before this double-faced handbill had been printed up in final form, Chrestensen was advised by your peti-

tioner that, while the protest appearing on its reverse side could be distributed without violating § 318 of the Sanitary Code, the entire handbill could not be distributed. Your petitioner further stated that action would be taken against Chrestensen under § 318 if he attempted to distribute handbill A, and your petitioner thus successfully prevented its distribution.

6. On July 22, 1940, Chrestensen instituted in the United States District Court for the Southern District of New York an action to enjoin your petitioner from interfering with the distribution of handbill A on the streets, sidewalks and other public places in The City of New York. Jurisdiction was alleged to exist under § 24(1) of the Judicial Code, the amount in controversy being said to be in excess of $3,000, and also under § 24(14) of the Judicial Code.

7. On August 26, 1940 the District Court granted Chrestensen's motion for an injunction *pendente lite*, holding § 318 invalid on its face (34 F. Supp. 596).

8. After a trial at which the facts were stipulated (R. 20-23), the District Court entered a final decree dated December 13, 1940 granting Chrestensen a permanent injunction against interference with the distribution of handbill A. The Court held that § 318 was unconstitutional and invalid as applied to the distribution by Chrestensen of handbills such as handbill A on all streets, sidewalks and public places in The City of New York that were not within the jurisdiction of the Commissioner of Parks. The decree further provided, however, that certain regulations issued by the Commissioner of Parks were constitutional and valid in so far as they prohibited the distribution of such handbills in those public places which were under the jurisdiction of the Park Commissioner.

9. Chrestensen did not appeal from the last-mentioned part of the decree, and it can therefore be disregarded.

However, your petitioner promptly appealed from that part of the decree which restrained him from acting under § 318 of the Sanitary Code to prevent the distribution of this handbill on the city streets.

10. On July 25, 1941 the Circuit Court of Appeals affirmed the District Court (122 F. [2d] 511).* CLARK, J., with whom SWAN, J., concurred, wrote the prevailing opinion. FRANK, J., wrote a dissenting opinion.

Jurisdiction and Timeliness.

11. This petition is submitted under U. S. Code, tit. 28, § 347, subdivision (a), and the Court has jurisdiction to grant the writ.

12. Since the decision of the Circuit Court was handed down on July 25, 1941 and the order of affirmance was entered on August 19, 1941, the petition is timely.

13. The record remains in the custody of the Clerk of the United States Circuit Court of Appeals.

The Opinions Below.

14. In its opinion granting Chrestensen's motion for an injunction *pendente lite*, the District Court held § 318 entirely invalid and unconstitutional, relying primarily upon *Lovell* v. *Griffin*, 303 U. S. 444 (1938) and *Schneider* v. *State*, 308 U. S. 147 (1939). When the final decree was entered, however, the District Court did not go so far. Instead of holding § 318 invalid on its face, the Court made a finding that, in so far as § 318 prohibited the distribution of handbills such as handbill A, it abridged the freedom of the press secured by the First and Fourteenth

* The issue of the advance sheets containing the report of this case was not out when this petition and brief were prepared. We will therefore be unable to refer to specific page numbers when quoting the opinions in the Circuit Court.

Amendments to the Constitution of the United States, and constituted a deprivation of property without due process of law in violation of the Fourteenth Amendment to that Constitution.

15. Judge CLARK, with whom Judge SWAN concurred when the Circuit Court of Appeals affirmed the District Court, likewise interpreted *Schneider* v. *State, supra,* as holding that a municipality could not prohibit the street distribution of purely commercial handbills. As to this he said:

> "We think, therefore, that interpretation of the conclusions of the *Schneider* case is not doubtful. Absolute prohibition of expression 'in the market place' is illegal, not to be saved by any commercial taint attached to the expression; reasonable regulation of soliciting, not preventing freedom of expression, is permissible."

Judge CLARK then went on to discuss at some length the application to the hybrid handbill before him of the distinction that has been drawn by the New York Legislature and Courts between commercial and non-commercial handbills. On this aspect of the case, he rejected as uncertain and unreal your petitioner's argument that the nature of a particular hybrid handbill was to be judged by the circumstances out of which it came to be printed, its content and its purpose. And then, in conclusion, Judge CLARK stated the effect and scope of his decision as follows:

> "To avoid misunderstanding, perhaps we should say that, while absolute prohibition of commercial handbills seems to us of doubtful validity, yet we decide no more here than at least it cannot extend to a combined protest or advertising not shown to be a mere subterfuge."

16. Judge FRANK dissented from the majority's entire opinion. He concluded that it was apparent from the stipulated facts that Chrestensen's sole purpose in trying to

distribute handbill A was commercial, that there was no evidence of mixed motives on Chrestensen's part and that handbill A must therefore be considered a commercial circular. Judge FRANK likewise stated that, in his opinion, *Lovell* v. *Griffin, supra,* and *Schneider* v. *State, supra,* were not to be read as overruling earlier decisions of this Court, such as those connected with outdoor advertising and billboards, which are wholly inconsistent with the proposition that commercial advertisements are protected by the right of freedom of the press. On the contrary, Judge FRANK gave it as his opinion that the *Lovell* and *Schneider* cases referred only to "historic weapons in the defense of liberty" and "restrictions cutting off appropriate means through which, in a free society, the processes of popular rule may effectively function". Going on from there to consider as a question of first impression the City's power to prohibit the distribution of commercial handbills, Judge FRANK concluded that the right to disseminate opinions and informations that was guaranteed by the Constitution did not extend to commercial advertisements, and that the City's police power justified the adoption and enforcement of a regulation prohibiting the street distribution of commercial handbills such as Chrestensen's.

Summary Statement of the Matter Involved.

17. Section 318 of the Sanitary Code expressly declares that it applies only to "commercial and business advertising matter". The Courts of New York have consistently held that this regulation applies only to those advertisements which are intended to attract the attention and patronage of the public to enterprises entered into for pecuniary gain. Well before the *Lovell* and *Schneider* decisions, the New York Courts held that § 318 and its predecessor did not apply (1) to *non-commercial advertisements* (*i. e.*, advertisements of meetings held in furtherance of some political, social, economic or other move-

ment, irrespective of whether an admission is charged therefor), or (2) to *non-commercial literature* (*i. e.*, written matter calculated to communicate information or opinions on matters of public concern). Accordingly, there is squarely presented the question of whether a regulation that is carefully limited to *commercial advertisements* is constitutional; and the further question of whether, if such a regulation is constitutional, handbill A constitutes "commercial and business advertising matter".

This Court has never passed upon the question of whether the street distribution of *commercial* advertisements may be prohibited. To date the Court has merely held that the street distribution of *non*-commercial advertisements (such as an advertisement of a political meeting to which admission was charged) may not be prohibited. Your petitioner contends that the street distribution of commercial advertisements is in no way essential to a full and free exchange of information, ideas and opinions on matters of public concern; that the street distribution of commercial advertisements is not protected by the freedom of press that is secured by the First and Fourteenth Amendments to the Constitution; and that the street distribution of such advertisements may therefore be prohibited under the police power.

Your petitioner further contends that the question of whether a hybrid handbill is or is not a commercial advertisement depends upon the facts and circumstances of a particular case, and that the facts which have been stipulated in the instant case demonstrate that handbill A is unquestionably a commercial advertisement.

Questions Presented.

18. The questions presented are:

(a) Has this Court held, in the *Lovell, Schneider* or other cases, that a municipality may not pro-

hibit the street distribution of commercial advertisements?*

(b) May a municipality, in the exercise of its police power, prohibit the street distribution of commercial advertisements without violating the right of freedom of the press that is secured by the First and Fourteenth Amendments to the Constitution of the United States, and without violating the due process clause of the Fourteenth Amendment to the Constitution of the United States?

(c) Did the Circuit Court of Appeals correctly hold that handbill A is not (a) a commercial advertisement, or (b) "a mere subterfuge" which was devised in an effort to evade § 318 of the Sanitary Code?

(d) Did the Circuit Court of Appeals correctly hold that § 318 of the Sanitary Code is invalid and unconstitutional if applied to handbills such as handbill A?

Reasons for Allowance of Writ.

19. This case raises an important question of constitutional law which has not been decided by this Court, and which is of vital concern to municipalities throughout the country.

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* It should be kept in mind that the term "commercial advertisements", as used in this petition and its supporting brief, excludes all such advertisements as those which relate to books or circulars of a political, religious or social nature, or those which relate to public meetings devoted to subjects of general interest at which an admission may be charged. In short, the term "commercial advertisements" is here restricted to include only those advertisements which are circulated for purposes of private gain in connection with a purely commercial enterprise such as the exhibition for profit of a privately owned submarine.

20. The littering of streets which results from the street distribution of advertising handbills creates fire, flood, health and traffic hazards, and imposes a considerable burden, financially and otherwise, upon a municipality's street cleaning department. It is generally recognized that the only effective means of preventing the hazards and expense which result from the increasing use of handbills as a commercial advertising medium, is to attack the problem at its roots. That is, to prohibit the distribution of such handbills, rather than to attempt to enforce against the hundreds or thousands of persons who throw such handbills away an ordinance which prohibits the *casting away* of handbills rather than their *distribution*. The decision below denies a municipality the use of the only practical and effective weapon of which it may avail itself in an effort to solve this problem. Numerous inquiries and communications which your petitioner and his counsel have received from municipal law enforcement agencies throughout the country attest the fact that the decision below seriously hinders and embarrasses them in meeting a difficult problem.

21. In thus denying the City of New York the power to prohibit the street distribution of commercial advertisements, the Circuit Court of Appeals has unduly and unnecessarily restricted the exercise of the City's police power, and has disregarded applicable decisions of the New York Courts.

22. The Circuit Court of Appeals has disregarded and failed to apply earlier decisions of this Court relating to the prohibition and regulation of commercial advertising; has misinterpreted and extended beyond their true scope the decisions of this Court in *Lovell* v. *Griffin, supra,* page 4, *Schneider* v. *City, supra,* page 4, and *Hague* v. *C. I. O.*, 307 U. S. 496 (1939); and has misconstrued and extended beyond its true scope the right of freedom of the press that is secured by the First and Fourteenth Amendments to the Constitution of the United States.

23. In refusing to hold that the handbill before the Court constitutes "commercial and business advertising matter", the Circuit Court of Appeals has sanctioned an easy and simple method of evading municipal restrictions against the street distribution of commercial advertisements; has sanctioned the use of the bill of rights as a cloak to further private commercial ends; and has misinterpreted and misapplied the right of freedom of the press that is guaranteed by the Constitution.

24. Since the Circuit Court of Appeals has held Section 318 of the Sanitary Code unconstitutional in so far as it applies to handbills such as handbill A, your petitioner is informed and believes that he has a right to appeal to this Court under U. S. Code, tit. 28, § 347 (b). However, in an effort to make certain that all of the questions presented and disposed of below will be before this Court, your petitioner has determined to file this petition for a writ of certiorari in lieu of perfecting such an appeal.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals for the Second Circuit in this case, being No. 358 on its calendar for the October Term, 1940, to the end that the case may be reviewed and determined in this Court, as provided in Title 28, Section 347 of the Code of Laws of the United States, and that the said final order of the said Circuit Court of Appeals for the Second Circuit in this case, and every part thereof, may be reviewed by this Court, and the determination of the said Circuit Court of Appeals for the Second Circuit, as well as the determination of the United States District Court for the Southern District of New York, which was affirmed by the

United States Circuit Court of Appeals for the Second Circuit, may be reversed and a mandate issued denying the plaintiff's prayer for relief and dismissing the complaint; and your petitioner prays for such other and further relief as to this Court may seem just and equitable; and your petitioner will ever pray.

New York, N. Y. October 20, 1941.

LEWIS J. VALENTINE, individually and as Police Commissioner of the City of New York, *Petitioner*,

By WILLIAM C. CHANLER,
Corporation Counsel of the City of New York,
Municipal Building,
New York, N. Y.

Supreme Court of the United States

No. . October Term, 1941.

Lewis J. Valentine, individually and as Police Commissioner of The City of New York,

Petitioner,

against

F. J. Chrestensen.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This case presents the question of whether a municipality may prohibit the street distribution of commercial handbills without interfering with the freedom of the press that is guaranteed by the First and Fourteenth Amendments to the Constitution. That important question of constitutional law has not yet been passed upon by this Court. Some day it must be, for it is vitally important to every municipality in the country to discover whether its police powers are such as to permit it to adopt this practical and effective means of solving the many problems which have arisen from the increasing use of handbills as a commercial advertising medium.

The Facts:

The material facts were stipulated at the trial (R. 20-23). As stipulated, they were found by the District Court (R. 10).

Chrestensen owns, and exhibits for profit, the former Navy submarine S-49. When he brought his submarine to

New York City in the late Spring of 1940, he sought permission from the City Dock Commissioner to exhibit it at a city-owned pier. This permission was denied him in accordance with an established city policy. He thereupon obtained the use of a nearby state-owned pier.

As a part of his campaign to attract patronage, Chrestensen prepared handbill No. 1, which described the submarine's attractions and solicited public patronage at certain stated prices (R. 26). When he attempted to have this handbill distributed on the City streets he was advised by the police authorities that its distribution would violate § 318 of the Sanitary Code for the reason that it constituted "commercial and business advertising matter" (R. 22).

Chrestensen thereupon prepared handbill A (R. 24-25). Although the face of that handbill differs in some respects from handbill No. 1, it is stipulated that its face contains commercial and business advertising matter and nothing else (R. 22). Its reverse side contains a protest against the action of the Dock Commissioner in denying him the use of a City-owned pier. It is stipulated that this reverse side does not contain commercial and business advertising matter, but a public protest (R. 22).

A printer's proof of handbill A was submitted to the police authorities (R. 23). Chrestensen was advised that a handbill consisting solely of the protest matter printed on its reverse side could be distributed without restraint (*ibid.*). He nevertheless went forward with his plans, had handbill A printed up as a single document, and as a result was restrained from distributing it by the police authorities (*ibid.*). This proceeding was then brought to enjoin the Police Commissioner from interfering with its distribution.

Three facts deserve special mention. First, Chrestensen made no attempt to prepare or distribute a protest against the Dock Commissioner until *after* he had been advised that he could not distribute a straight commercial handbill such as handbill No. 1. Second, Chrestensen *at no time*

sought to distribute a straight protest handbill even though he had been specifically told by the police authorities that he was entitled to do so. Third, his purpose in distributing a handbill was clearly to increase the profits of his business enterprise. Chrestensen asserts, and it has been stipulated, that the action of the police authorities has diminished his net profits by more than $3,000 (R. 23).

POINT I

A municipality may, in the exercise of its police power, prohibit the street distribution of commercial advertisements.

If there be no distinction in law between a regulation prohibiting the street distribution of commercial handbills, and a regulation prohibiting the street distribution of non-commercial opinion or protest literature, it is futile to discuss either the scope of § 318 of the Sanitary Code or the nature of handbill A. We therefore propose to show at the outset that a municipality may lawfully prohibit the street distribution of commercial advertisements without infringing the right of freedom of the press.

(1)

It is evident from this Court's own decisions that a distinction exists between commercial advertisements on the one hand, and protest or opinion literature on the other, as respects the constitutional guaranty of freedom of the press. Enactments prohibiting outdoor street advertising and billboard advertising have been sustained by this Court without even a mention of freedom of the press. *Fifth Avenue Coach Co.* v. *New York City*, 221 U. S. 467 (1911); *Packer Corporation* v. *Utah*, 285 U. S. 105 (1932). Similarly, second class mailing privileges, which are accorded only to newspapers and periodicals and denied to commercial advertisements, have received un-

stinted approval. *Lewis Publishing Co. v. Morgan*, 229 U. S. 228 (1912); 39 U. S. C., § 226; CHAFFEE, *Freedom of Speech*, pp. 198, 199. Similar discrimination against commercial advertisements has frequently been adopted in tariff regulations. *Van Doorn* v. *U. S.*, 12 Court of Customs Appeals 167 (1924). Also, while the display of a flag for the purpose of expressing a political opinion cannot be constitutionally prohibited, *Stromberg* v. *California*, 283 U. S. 251 (1931), the display of the flag for what this Court has called "mere advertising" purposes can be and is so prohibited. *Halter* v. *Nebraska*, 205 U. S. 34 (1907).

This distinction is based upon the fact that neither the content nor the purpose of commercial advertising matter fits the rationale of the democratic institution of a free press. To restrict the use of commercial advertisements will in no way impair that right to a full and free exchange of opinion and information on matters of public concern which is secured us by the First and Fourteenth Amendments to our Constitution. To appreciate the truth of this, it is only necessary to consider what is meant by a free press, and why our Constitution insists upon it. As was said in *Thornhill v. Alabama*, 310 U. S. 88 (1940), to cite but a single instance (p. 95):

> "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. *Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.*" (Italics ours.)

(2)

Our contention that the unrestricted distribution of commercial advertisements is not essential to maintaining the freedom of the press, has been met primarily with the assertion that this Court has ruled otherwise in *Lovell* v. *Griffin*, 303 U. S. 444 (1938), *Hague* v. *C. I. O.*, 307 U. S. 496 (1939) and *Schneider* v. *State*, 308 U. S. 147 (1939). But to refute this argument of *stare decisis*, it is only necessary to examine the questions which were before the Court in the cases on which the argument is based.

In the *Lovell* case this Court held that a municipality could not prohibit the street distribution of religious tracts setting forth the Gospel of the Kingdom of Jehovah. In the *Hague* case it was held that a municipality could not forbid the street distribution of C. I. O. organizing literature. The *Schneider* case was really four cases. There this Court held that a municipality could not prohibit the street distribution of (1) notices of a protest meeting in connection with the administration of state unemployment insurance, (2) pamphlets of the Watch Tower Bible and Tract Society, a branch of the religious sect known as Jehovah's Witnesses, (3) strike literature, and (4) handbills advertising a meeting to be held under the auspices of "Friends Lincoln Brigade" to discuss the Spanish Civil War.

Manifestly, none of the literature involved in the above cases constitutes commercial advertising as we use that term. In each instance a municipality had attempted to prohibit the distribution of literature which related to matters of public concern, and which was therefore clearly protected by the right of freedom of the press. True, since the notices of the meeting with reference to the war in Spain which were before the Court in the *Schneider* case showed that a stated admission price was to be charged, that fact led to a characterization of those notices as "advertisements". However, as they were advertisements of a meeting which was to be devoted to the discussion of a

political, social and public question, those notices were certainly not *commercial* advertisements. On the contrary, they were *non*-commercial advertisements within the rationale of a free press for the reason that their suppression would have limited the discussion of matters of public concern.

It is respectfully submitted that the decisions above cited went no farther than to hold that street distribution *of literature of the sort which was before the Court* could not be prohibited. There is no reason to suppose that, in so holding, the Court intended so to expand the meaning of "the press" as to overrule the cases cited on page 15, *supra*, or to enunciate a new doctrine to the effect that "the press" embraces every written word. Indeed, the Court has twice indicated that its recent handbill decisions are not to be taken as holding that every written or spoken word is protected by the bill of rights. In *Thornhill* v. *Alabama*, *supra*, p. 16, Mr. Justice MURPHY said (310 U. S., at p. 102):

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as *within that area of free discussion that is guaranteed by the Constitution.*" (Italics ours.)

Similarly, in *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940), Mr. Justice FRANKFURTER said (p. 599):

> "In cases like * * * *Lovell* v. *Griffin*, 303 U. S. 444, *Hague* v. *C. I. O.*, 307 U. S. 498 and *Schneider* v. *State*, 308 U. S. 147, the Court was concerned with restrictions cutting off appropriate means through which, in a free society, *the process of popular rule may effectively function.*" (Italics ours.)

(3)

If it be granted, as it must be, that there is a rational and sound basis for distinguishing between commercial advertisements on the one hand and non-commercial ad-

vertisements on the other, the question of a municipality's power to prohibit the street distribution of commercial advertisements is easily resolved. For the question then becomes one of the extent of the city's police power, as to which there can be no doubt.

The widespread existence of ordinances prohibiting or regulating the street distribution of handbills sufficiently attests the fact that the unfettered street distribution of handbills is a serious municipal problem. We all know that most handbills which are passed out on the streets are soon cast away. They then constitute a traffic hazard, particularly if it is windy and they are blown about; they constitute a health hazard in that sewers and gutters become clogged; for the same reason they constitute a flood hazard; they constitute a fire hazard; and they inevitably result in an additional burden on the municipal budget if only because of the necessity for clearing them from the streets.

Admittedly, non-commercial handbills are as obnoxious in these respects as are commercial handbills. However, given the constitutional guarantee of freedom of the press, the hardships resulting from the distribution of non-commercial handbills must be endured. But such is not the case with regard to commercial handbills. Being without the scope of the Constitution's protection, a municipality is free to adopt such reasonable measures as it sees fit to remedy the evils to which they give rise.

The City of New York has seen fit to solve this problem by prohibiting the street distribution of commercial advertisements. We submit that such a remedy is a reasonable one, and is therefore a proper exercise of the City's police power.

It will scarcely be suggested that a city must allow its citizens to conduct their private businesses on its streets. For example, a City may outlaw push carts and peddlers. By the same token, it may prohibit advertising signs which overhang its streets, it may outlaw advertising signs on buses and trucks which traverse its streets, and it may keep show cases from its sidewalks. What, then, is

so sacrosanct about an advertising handbill that it may not be kept from the streets?

The Circuit Court of Appeals states that a municipality may only regulate, and may not prohibit, the street distribution of commercial advertisements. Among other things, it is suggested that a city might prohibit the *casting away* of such advertisements rather than their *distribution*. To suggestions such as these there are two answers. In the first place, no one can deny that the only practical and effective way of preventing littering is a prohibition against the distribution of handbills, and not through the enactment of impracticable ordinances against casting handbills away after they have been distributed. For, while a single individual is responsible for causing the distribution of handbills advertising a particular business enterprise, those who receive the handbills and cast them away after they have been distributed can be counted only in the hundreds or the thousands. Nor is the Court's suggestion of a "time and place" regulation of the distribution of such handbills a practical one. While regulations as to "time and place" are effective with respect to parades, assemblies and street speakers, they do not fill the bill with respect to handbills, which will be cast away no matter when or where they are distributed. But in any event, the choice of remedies to be adopted to meet a particular situation lies with the legislature and not with the Courts. Therefore, to deny the City the power to remedy an obvious evil by the only practical means of doing so, is not only to exalt the business interests of a few above the welfare of the many, but is to substitute the judgment of the courts for that of the legislature.

It follows that a prohibitory ordinance or regulation which is so drawn as to be limited to commercial advertisements alone is not open to objection on constitutional grounds. Here is but another instance in which the individual's claim of deprivation of property without due process of law must yield to the public's right to have its welfare protected through the exercise of the police power.

POINT II

Section 318 of the Sanitary Code applies only to commercial and business advertising matter.

It has frequently been held that a prohibitory ordinance is to be judged on its face, and not by what is done under it in a particular case. In deference to this rule of law, we wish to emphasize the fact that § 318 of the Sanitary Code—by its express terms—applies only to commercial advertising matter.* Its last sentence reads as follows:

> "This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter."

This is language that is plain and easily understood. Moreover, even before this sentence was added to § 318 in 1938, the New York Courts had made it plain that § 318 was intended to apply to commercial advertising matter only. In 1921 it was held that § 318 in its then form was "never intended to prevent the lawful distribution of anything other than commercial and business advertising matter," and that it did not apply to the circulation of anti-Ku Klux Klan leaflets. *People* v. *Johnson,* 117 Misc. 133 (Gen. Sess., N. Y. Co., 1921). More recently it was held that notices and advertisements of a communist mass meeting were not commercial advertisements within the scope of § 318 even though they set forth the price of ad-

* Exhaustive research has turned up no state decisions forbidding the prohibition of commercial advertisements under ordinances which were so drawn as to apply only to advertisements of such a nature. Cases have been found in which ordinances were held invalid, even as to commercial advertisements, for the reason that they were so broadly or indefinitely drawn as to be capable of application to protest or opinion literature. We recognize the soundness of those decisions. Their irrelevance to the case at bar is demonstrated by the discussion of § 318 of the Sanitary Code which is contained in this Point.

mission to the meeting. *People* v. *Loring and Green* (Mag. Ct., N. Y. Co., 1933, unreported but noted in 1 International Juridical Association Bulletin, No. 12, page 2).

It will be noted that these decisions are in full accord with the *Lovell, Hague* and *Schneider* cases. And in a case which arose after this Court decided those three cases, the precise views which are expressed in this brief were adopted in a case which presented the question of whether the street distribution of a department store advertisement could be prohibited under § 318. In *People* v. *LaRollo,* 24 N. Y. Supp. (2d) 350 (Mag. Ct., N. Y. Co., 1940), the Court held that § 318 was clearly constitutional as applied to such an advertisement. The essence of the Court's opinion is contained in the following quotation (p. 354):

> "The considerations which justify and require that the public interest in the cleanliness of its streets be made subordinate to the more important rights of its citizens freely to proclaim their ideas and principles, are not equally applicable where the individual distributor seeks merely to advertise and solicit patronage for his purely commercial enterprise."

An examination of the New York cases reveals that the New York Courts, in holding that the distribution of *non*-commercial literature could not be restrained under § 318, have consistently done so upon the ground that § 318 *was not intended to apply to such literature.* We therefore submit, first, that the purpose and scope of § 318 are not open to dispute; and, second, that § 318 is not so broad and all-embracing in its application as to be subject to condemnation upon the ground that it applies to literature of the sort which is protected by the Constitution.

POINT III

Christensen's handbill comes within the scope of § 318 of the Sanitary Code.

We come now to the question of whether handbill A constitutes "commercial and business advertising matter" within the meaning of § 318 of the Sanitary Code. The majority of the Court below has held that it is not a commercial handbill, and that it is not "a mere subterfuge." Judge FRANK has reached precisely the opposite conclusion.

It will be recalled that Chrestensen prepared handbill A only after he had been told that he could not distribute handbill No. 1; that he had up to that point made no effort to distribute any protest as to the action of the Dock Commissioner in refusing him the use of a city-owned pier; that he first presented handbill A to the Police Commissioner in proof form and was told that he could distribute the reverse, or protest, side of the proposed handbill without interference; and that at no time did he show the slightest inclination to distribute a handbill that consisted purely of a protest.

We submit that only one conclusion can be drawn from the stipulated facts of this case. Chrestensen was conducting a commercial enterprise for profit alone. The only reasonable inference is that he added the reverse, or protest, side of handbill A solely in the hope that to do so would make it possible for him to distribute its face, or advertising, side. Thus he would increase his profits. It must not be forgotten that he has stated, and it has been stipulated, that the prohibition of handbill A under § 318 would result in a decrease in the number of persons paying admission fees to his submarine, and would thereby deprive him of net profits in excess of $3,000 (R. 23).

The majority of the Court below disagreed, in principle, with our view that the courts should inquire into the cir-

cumstances surrounding the origin and purpose of hybrid handbills such as that involved here, and then decide whether they were or were not commercial in character. To do so, said Judge CLARK, would lead to "uncertainty, not to speak of unreality", and would necessitate the drawing of a line where none clearly appears.* But, as Judge FRANK pointed out, the making of such decisions and the drawing of such lines is inherent in the nature of the judicial process. It was Mr. Justice HOLMES who frequently stated that where to draw such lines "is the question in pretty much everything worth arguing in the law." Judge CLARK might as well criticize the concepts of "negligence," the "reasonable man," "restraint of trade" and many others long rooted in our jurisprudence. The courts must explore the penumbra which lies between light and darkness.

We therefore respectfully urge that, so far as the facts of this case go, Judge FRANK was correct in characterizing the situation as follows:

> "And especially in the instant case there need be no judicial anguish in drawing a line and no occasion for psychological probings of Chrestensen's mental interior in order to ascertain what he was after, when endeavoring to distribute the matter on the face of Exhibit A: * * *".

A word as to policy. We submit that every consideration of policy requires a holding that a handbill such as this should not be given the protection of the First and Fourteenth Amendments to the Constitution. The civil

* We know of only one other case involving a hybrid handbill, *People* v. *Taylor*, 33 Cal. App. (2d) 760, 85 P. (2d) 978 (1938). The handbill with whose distribution the Court there refused to interfere was a four-page mimeograph published by the San Diego Communist Party Election Campaign Committee which was devoted mainly to political discussion, but which contained an advertisement of a non-profit bookstore. The Court had no difficulty in holding that such a pamphlet fell on the "free press" side of the line.

right of freedom of the press is a precious and valuable safeguard of our way of life. As such, the Courts must be as vigilant to see that it is not abused, as they are to see that it is observed. Only thus will it be accorded the respect which is its due, and only thus will it preserve its usefulness and value.

The decision below has opened the way for the owner of every business enterprise in the country to flood the streets of our cities with commercial advertising under the guise of exercising the right of freedom of the press. That this will create an administrative problem of the first magnitude for municipalities is bad enough. But what is worse, it will inevitably tend to decrease the regard in which our civil rights are held. For, to put it bluntly, Chrestensen has been permitted to exploit the bill of rights to promote a purely commercial enterprise. That he should not be permitted to do, any more than he should be permitted to use the Flag for advertising purposes. *Cf. Halter* v. *Nebraska, supra,* page 16.

We therefore submit that the Court below erred on two counts on this branch of the case. First, in its interpretation of the facts, which led to the erroneous holding that handbill A is not "commercial and business advertising matter." Second, in its conception of policy, which led to the likewise erroneous holding that every effort should be made to hold that hybrid handbills such as these fall on the protected side of the line.

CONCLUSION.

This case raises a question of constitutional law which is of such importance that it will eventually have to be decided by this Court. That question, whether a municipality may prohibit the street distribution of commercial advertisements, arises here in connection with a handbill which is of a hybrid nature. That circumstance makes this a particularly good case in which to consider this important problem. For, as our record suggests, if

this Court were to hold in a case involving a straight commercial handbill that a city could prevent the distribution of such a handbill, some ingenious individual would promptly test the limits of that decision by devising a hybrid handbill consisting partly of advertising matter and partly of protest matter. But if this petition be granted, the Court can consider both questions at one and the same time. Only when that has been done will municipal authorities be fully apprised of the scope of their powers with respect to the distribution of commercial handbills.

The petition for certiorari should be granted.

New York, N. Y., October 20, 1941.

Respectfully submitted,

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